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IN THE

Supreme Court of the United States

October Term, 1966

NO. 493

JOSEPH ROBERT RALPH, EUGENE C. LEWIS, and M. RAY HURST, JR., et al,

Petitioners,

versus

TIDEWATER CONSTRUCTION CORPORATION, a corporation, RAYMOND INTERNATIONAL, INC., a corporation, and PETER-KIEWIT SONS' CO., a corporation, Joint venturers, trading as TIDEWATER-RAYMOND-KIEWIT, and MERRITT-CHAPMAN & SCOTT CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners, Joseph Robert Ralph, Eugene C. Lewis

and M. Ray Hurst, Jr., et al [1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the above entitled cause of May 30, 1966. [2]

OPINIONS BELOW

The initial administrative ruling in this case was made by Regional Director Pat Meloan of the United States Department of Labor, Wage and Hour and Public Contracts Division, (R. Vol. II, p. 135) and is printed in Appendix B hereto, infra, p. 14.

The final administrative ruling of Administrator Clarence T. Lundquist of the United States Department of

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[1] This petition involves three cases pertaining to the identical points of law. They were consolidated for the purpose of trial in the District Court and heard as a single case on a single record in the Court of Appeals for the Fourth Circuit. The numbers of the cases below, consolidated for argument, with the actual plaintiffs involved are:

No. 10,269 — Joseph Robert Ralph, F. A. Board, Joseph G. Burns, Alvin E. Campbell, James W. Carrington, Clayton C. Cope, Carlton P. Corbett, Robert W. Cox, Paul A. Delaney, William M. Delesline, Willard S. Dudley, Jr., Henry N. Early, Charles G. Elswick, Victor W. Fletcher, Robert W. Fowler, Richard K. Freeman, John W. Goley, Jasper, S. Goodwin, Odis R. Goodwin, B. F. Jones, Ralph M. Lewis, Henry F. McKeithan, Marvin Milton Morgan, Donald H. Murden, Louis H. Myers, A. A. Nance, Jr., James M. Perkins, Jr., Harry W. Pouchie, Sam L. Price, Earl G. Read, Johnnie N. Roberson, Leonard R. Roberson, Thomas G. Roberson, J. W. Robinson, W. R. Short, Robert E. Thomas, Felix R. Thornton, Rudolph Ward, Frank T. White, Jr., James J. White and James Mayo Wynn.

No. 10,270 — Eugene C. Lewis, Ray Ball, Jr., Oscar Bergman, George H. Cooney, Marvin S. Bonney, John P. Braswell, Wilbur Brinson, Harold B. Cartwright, Roy Goodson, George Gray, R. C. Gray, Jr., George N. Hanbury, Thomas F. Jordan, Ralph M. Keating, Joseph C. Kelly, Robert J. Mapp, James W. Patterson, Edwin M. Porter, Rufus J. Powell, D. W. Reebals, Charles A. Sarkis, D. S. Shannon, Lennon F. Smith, Wesley Tart, Curtis I. Tebault and Denward J. Womack.

No. 10,271 — M. Ray Hurst, Jr., and T. O'Neal, Jr.

[2] As a test, a petition for rehearing aws sought in case No. 10,269, Joseph Robert Ralph, et al, vs. Tidewater-Raymond-Kiewit, et al, which petition was denied on July 20, 1966.

Labor, Wage and Hour and Public Contracts Division, (R. Vol. II, 139 (is printed in Appendix B hereto, infra, p. 18).

The oral opinion of the District Court (R. Vol. I, 93) is unreported and is printed in Appendix B hereto, infra, p. 21.

The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported at 361 F. (2d) 806, and is printed in Appendix B hereto, infra, p. 23.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

(1) Whether the "written contract" exception to the Portal to Portal Act allows a Fair Labor Standards Act interstate employer to enter into a collective bargaining argreement with a union for payment of less than the Fair Labor Standards Act minimums.

(2) Whether union workers who are required by their employer to (1) report at assembly sites, proceed to loading piers, (2) board company owned boats and (3) ride to the worksite in the middle of Chesapeake Bay under the supervision of the company are to be considered as travelling to work under the Portal to Portal Act.

STATUTES INVOLVED

The statutory provisions involved are the Fair Labor Standards Act, 29 U.S.C. 206, (a), (1), printed in Appendix A hereto, infra, p. 11 and 207, (a), (1), printed in Appendix A hereto, infra, p. 11, and the Portal to Portal

Act, 29 U.S.C. 254, printed in Appendix A hereto, infra, p. 11.

STATEMENT

The employers who are the respondents in this Petition, are Tidewater Construction Corporation, Raymond International, Inc., and Peter Kiewit Sons' Company, who formed a joint venture trading as Tidewater-Raymond-Kiewit, and who together with Merritt-Chapman & Scott Corporation undertook to construct a 17.9 mile ocean highway consisting of a series of bridges and tunnels spanning Chesapeake Bay where it meets the Atlantic Ocean. [3] The respondents will hereinafter be designated as "EMPLOYERS".

Petitioners are iron workers and operating engineers employed to man specially designed equipment for the construction of the project and will be hereinafter designated as "WORKERS".

The conditions of employment required "WORKERS" to assemble at the yard base of "EMPLOYERS" at times designated by "EMPLOYERS", there to don life preservers and hard hats and board boats owned and operated by "EMPLOYERS" so as to rendezvous as assembled crews at various work sites in Chesapeake Bay. (R. Vol. I, p. 20) The time consumed in getting to the various sites in the Bay as the work progressed varied from thirty minutes to one hour each way. (R. Vol. I, p. 55) "WORKERS" were covered by workmens' compensation and were under the orders of "EMPLOYERS" and performed such work as might be required commencing with reporting time ashore. (R. Vol. I, p. 58)

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[3] Tidewater-Raymond-Kiewit constructed the bridges and Merritt-Chapman & Scott constructed the tunnels that constitute this ocean highway.

"EMPLOYERS" reached the decision not to compensate workers on a regular time basis for the time consumed in riding the boats from shore to construction sites in the Bay. This decision precipitated negotiations between "EMPLOYERS" and unions representing "WORKERS", as "WORKERS" desired full compensation under the Fair Labor Standards Act, hereinafter designated as "F.L.S.A.", starting with the hour they were required to report at the assembly sites ashore. "WORKERS" had insufficient economic strength to obtain a contract so providing, (R. Vol. I, p. 54) and as a compromise a written agreement was entered into between the parties for "WORKERS" to be paid a flat sum of $2.50 per day for the time involved, without regard to the actual hours involved. No representatives of "EMPLOYERS" sought administrative approval prior to the inception of the scheme of payment decided upon. (R. Vol. I, pp. 63, 64) After the commencement of construction an investigation was conducted by Regional Director Pat Meloan of the Wage and Hour and Public Contracts Division of the Department of Labor and "EMPLOYERS" were notified that the provision in the contract between the parties to compensate for the activity of assembling and riding the boats precluded the immunity of the Portal to Portal Act and made the time compensable under "F.L.S.A.".

"EMPLOYERS'" representatives arranged an ex parte conference with the Administrator of the Wage and Hour and Public Contracts Division of the Department of Labor in Washington, D. C., and on the basis of the facts presented by "EMPLOYERS", the Administrator ruled the question close, but reversed the Regional Director.

Suit was brought by "WORKERS" under "F.L.S.A." in the District Court and although a jury was impaneled both parties moved for a judgment on the evidence. The Lower Court ruled as a matter of law that the Regional

Director was correct that an agreement in writing to compensate for the subject activity excluded the matter from the Portal to Portal Act and required compliance with "F.L.S.A.". The Court ruled as a matter of law that the activity was preliminary and postliminary activity that in the absence of a written agreement would be protected by the Portal to Portal Act.

The Lower Court permitted the jury to pass upon "EMPLOYERS' " defense of good faith reliance on an administrative ruling, 29 U.S.C. 258, which section is printed in Appendix A hereto, infra, p. 13. The jury found for "EMPLOYERS" on this defense and "WORKERS" appealed to the Court of Appeals for the Fourth Circuit.

The Appellate Court reversed the District Court, holding that the good faith reliance defense was not available to "EMPLOYERS", and the Court reversed the District Court holding that the Portal to Portal Act, 29 U.S.C. 254, permitted parties to agree in writing to compensate for travel time at a rate less than required by "F.L.S.A.", but affirmed the District Court's ruling that as a matter of law the time spent in boats was Portal to Portal activity.

REASONS FOR GRANTING WRIT

1. The purpose of the Portal to Portal Act was to eliminate the unexpected exposure of industry for substantial claims to overtime by reason of activities that had never been compensable in any amount. *Steiner* v. *Mitchell,* (1956) 350 U.S. 247, 253.

Congress made it clear that immunization would be awarded an "EMPLOYER" ony with respect to unexpected liability by specifically precluding the protection of the Act from any activity compensable by either an ex-

press provision of a written or non-written contract between an employee, his agent or collective bargaining representative and his employer.

This significant exclusion of nationwide applicability to labor-management contracts has never been interpreted by this Court or an appellate court, prior to the instant decision. The history of administrative and judicial rulings in this case memorializes the uncertainty and confusion that currently prevails regarding what appears to be the clear language of the Portal to Portal Act.

Despite the apparent clear intent of the statement of policy of the Department of Labor published in 29 C.F.R. 790.9 (b), [4] the Regional Director differs with the Administrator [5] and the District Court differs with the Circuit Judges. [6]

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[4] 29 C.F.R. 790.9 (b):

"The word 'compensable' is used in subsections (b), (c) and (d) of Section 4 without qualification. It is apparent from these provisions that 'compensable' as used in the statute, means compensable in any amount."

[5] (R. Vol. II, p. 138):

"* * * Unquestionably the riding activities of employees represented by Local 147 have been made compensable by contract. * * * the parties cannot by contract nullify requirements of the statute by attempting to agree that the time 'will not be considered as working time for any purpose.' "

(R. Vol. II, p. 142)

"* * * Although concededly this is a borderline case in which a strong argument may be made that the language of the contract provisions makes the travel activity itself compensable, we believe the conclusion we have reached is more consistent with the meaning which the parties attribute to the contract language."

[6] (R. Vol. I, p. 93):

"The Act expresses a basic proposition and it appears to the Court that the language of the Act is very plain and should be applied literally. * * * Once parties to a labor contract make a bargain for the compensation of travel, they should know that it will be considered in computing wages. The Act clearly provides for his. If the Act is construed otherwise, the language of every contract would have to be scrutinized, and labor agreements could provoke litigation. There are

The holding of the Appellate Court that the parties could agree in writing to compensate for the activity of assembling and riding on terms less than required by "F.L.S.A." constitutes an indirect attack on the established principle that no written contract can have the effect of diluting the overtime policies of "F.L.S.A." regardless of the intent of the parties. *Wirtz* v. *Leonard,* (5 Cir. 1963) 317 F. 2d 768 and *Handler* v. *Thrasher,* (10 Cir. 1951) 191 F. 2d 120, 123. [7]

An essential prerequisite to harmony between labor and management is an understanding of the legislative ground rules governing compensation and negotiations. Judicial confusion should be eliminated by the ruling of this Court. It is important that national acts, such as the "F.L.S.A." and the Portal to Portal Act receive uniform interpretation by the Federal Courts and such uniformity with respect to important provisions of these Acts can be aided by a review of the instant decision by this Court.

2. This Court in *Steiner v. Mitchell,* (1956) 350 U.S. 247, declared that the purpose of the Portal to Portal Act was to protect employers from wholly unexpected liabilities arising from overtime suits based upon activities that employers could not reasonably expect to be covered by "F.L.S.A.". Having declared this purpose, the Court re-

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many statutes that are designed to put litigation at rest and this, it appears to the Court, is one of them."

(R. Vol. III, p. 36):

"• • • Looking a the agreements the only reasonable construction was that the activity did not comprise compensable work hours. See *Gramiak* v. *Pittston Stevedoring Corp.,* 13 WH Cas. 17, 30 CCH Par. 70,098 (S.D.N.Y. 1956) • • •"

[7] In *Handler* v. *Thrasher,* (10 Cir. 1951) 191 F. 2d 120, 123, Circuit Judge Murrah, stated:

"• • • But it is too well settled to admit of discussion that a contract which has for its purpose or which has the effect of circumventing or invading the command of the Wage and Hour Act, is invalid and unenforceable."

fused to condone a liberal interpretation of the immunization granted the employer with respect to preliminary and postliminary activities and held that activities which were an integral and indispensable part of the principal activities for which covered workmen were employed would not be covered by the Portal to Portal Act.

The push of progress is sending specially trained work crews to offshore construction sites to build ocean highways, Texas towers, permanent navigational aids and similar structures. The requirements of offshore construction activities apparently were not contemplated by the authors of the Portal to Portal Act and are in need of judicial interpretation.

The requirement of industry to assemble these trained crews at a designated place at times certain and there to travel the open seas under the direction and control of the employer is an integral and indispensable part of offshore construction activities. Here, admittedly, "WORKERS" were composed of crews trained to operate special construction equipment designed to construct an ocean highway. The uniqueness of the equipment created industrial baptisms for identifying this equipment such as "THE TWO HEADED MONSTER" and the "BIG D". "WORKERS" were required to report to "EMPLOYERS' " assembly sites at "EMPLOYER" appointed times, there to board "EMPLOYERS' " boats so the crews would arrive as a team at various sites in Chesapeake Bay. The importance to "EMPLOYERS" of keeping the crews together caused "EMPLOYERS" to pay two hours regular wages as a consideration of "WORKERS" being at the assembly sites pursuant to "EMPLOYERS' " orders on days when the weather was too rough for the boats to go to sea. (R. Vol. I, p. 58)

No other Circuit appears to have dealt with this par-

ticular type activity and the need for clarifying the applicability of the Portal to Portal Act to the relatively unique working conditions in this new field of endeavor by the building trades of this nation suggests review of the instant opinion by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY E. HOWELL, JR.
Counsel for Petitioners.

August 26, 1966